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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 210

JAMES T. STEVENS, *Petitioner,*

v.

CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York, *Respondent.*

On Writ of Certiorari to the Appellate Division of the Supreme Court, First Judicial Department in the County of New York

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No. 290

JAMES T. STEVENS, *Petitioner,*

v.

JOHN J. MCCLOSKEY, Sheriff of New York City, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

In No. 210, the opinion of the Appellate Division, First Judicial Department, of the Supreme Court of New York is reported at 22 App. Div. 683, 253 N.Y.S. 2d 401. See 210

R. 40-41.[1] There were no other opinions in the State courts, leave to appeal to the Court of Appeals of New York having been denied by a simple order. 210 R. 56.

In No. 290, the opinion of the United States Court of Appeals for the Second Circuit is reported, *sub nom. United States ex rel. Stevens* v. *McCloskey*, at 345 F. 2d 305. See 290 R. 54-63. The opinion of the District Court for the Southern District of New York, per District Judge Weinfeld, is reported at 239 F. Supp. 419. See 290 R. 43-50. The opinion of District Judge Herlands of the same District Court, denying an earlier petition for a writ of habeas corpus, is reported at 234 F. Supp. 25. See 290 R. 39-42.

JURISDICTION

In No. 210, the Appellate Division's order was entered on October 30, 1964. 210 R. 40. Chief Judge Desmond of the Court of Appeals of New York on February 4, 1965, signed an order denying leave to petitioner to appeal to that Court. See 210 R. 56. On timely application, Mr. Justice Harlan on May 5, 1965, signed an order extending the time for filing a petition for writ of certiorari to and including June 3, 1965. See 210 R. 57. The petition for writ of certiorari was filed on June 3, 1965, and was granted by this Court on October 11, 1965, limited to the first question presented in the petition. See 210 R. 57-58. The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. § 1257(3).

In No. 290, the opinion and judgment of the Court of Appeals for the Second Circuit were entered on May 11, 1965. See 290 R. 63-64. The petition for writ of certiorari

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[1] The references to the printed records in these two consolidated cases appear herein as follows:

> The references to the record in No. 210, *Stevens* v. *Marks*, appear as 210 R. ——. The references to the record in No. 290, *Stevens* v. *McCloskey*, appear as 290 R. ——.

was filed on June 25, 1965, and was granted by the Court on October 11, 1965. See 290 R. 65. The grant of certiorari was limited to the first question presented in the petition and the case was consolidated for argument with No. 210. The jurisdiction of this Court to review the judgment below is premised on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This Court has limited its review of the judgments below to the first question presented in the respective petitions, a question which is common to both cases:

Is Article 1, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that any public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his public position and is barred from public employment for five years under the New York State Constitution and forever under the New York City Charter?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV, Section 1:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution, Article 1, Section 6 [McKinney's Consolidated Laws of New York Annotated, Book

2, Part 1, Constitution, p. 89 of 1965 pocket supplement], reads in pertinent part:

> No person . . . shall . . . be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.
>
> The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.
>
> No person shall be deprived of life, liberty, or property without due process of law.

New York City Charter, Section 1123 [New York City Charter and Code, Vol. 1, p. 307, 1963 ed., Williams Press, Inc.]:

> § 1123. Failure to testify. — If any councilman or other officer or employee of the city shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any

county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency. (*Derived from former* § 903.)

STATEMENT

A. The Basic Facts

The facts involved in these two cases are identical and undisputed. In summary fashion, they may be stated as follows:

The petitioner herein, James T. Stevens, was a lieutenant with the New York City Police Department. Prior to his summary discharge on July 16, 1964, he had completed 18 years of service and needed only two more years of service to be eligible for retirement. 210 R. 4.

In June of 1964 a grand jury investigation was initiated in New York County with reference to alleged bribes to public officials to frustrate enforcement of the state's anti-gambling laws. Petitioner was among those policemen who were included as subjects of this inquiry. And on five separate occasions, petitioner was called upon to testify before a grand jury in this connection.

(1) June 26, 1964. That morning, upon reporting as directed to the office of the Deputy Chief Inspector of the Police Department, petitioner was given a subpoena to report immediately to the New York County Grand Jury—known as First June 1964 Grand Jury. A superior officer was assigned to take him to the grand jury. Outside the

grand jury room and without counsel, petitioner was advised by an Assistant District Attorney to sign a limited waiver of immunity; otherwise, said the Assistant District Attorney, petitioner would be subject to removal from office pursuant to the state constitution and the city charter. 210 R. 3; 290 R. 2-3. Petitioner thereupon signed the waiver before witnesses, a waiver which read in pertinent part (210 R. 20; 290 R. 23) that he waived:

> ". . . all benefits, privileges, rights and immunity which I would otherwise obtain from indictment, prosecution and punishment for or on account of, regarding or relating to any matter, transaction or thing, concerning the conduct of my office or the performance of my official duties, or the property, government or affairs of the State of New York or of any county included within its territorial limits, or the . . . official conduct of any officer of the city or of any such county, concerning any of which matters, transactions or things I may testify or produce evidence, documentary or otherwise, before the 1st, 1964 Grand Jury in the County of New York, in the investigation being conducted by said Grand Jury."

Petitioner then went before the grand jury, his appearance being designated as an unsworn witness. 210 R. 9. At the outset, petitioner made the following responses to questions by the Assistant District Attorney (210 R. 9-10; 290 R. 25-26):

> Q. Lieutenant . . . Stevens, as was pointed out to you earlier, this grand jury is inquiring into the crimes of conspiracy to commit the crime of bribery of a public officer and the crime of bribery of a public officer; do you understand that?
>
> A. I do.
>
> Q. Do you understand further that you have been called here as a potential defendant, not as a witness; do you understand that?
>
> A. I do.

Q. Do you understand that under the Constitution of of the United States you have a right to refuse to answer any questions that might tend to incriminate you; do you understand that?

A. I do.

Q. Do you understand further that under the New York State Constitution, the New York City Charter, a public officer is required, if he desires to continue to hold his public position, to sign a limited waiver of immunity; do you understand that?

A. I do.

Q. Do you understand that that means that if you sign a limited waiver of immunity which requires you to answer questions concerning the conduct of your public office, that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you. Do you understand that?

A. I do.

Q. Are you prepared to sign a waiver of immunity?

A. I am.

The petitioner was thereupon duly sworn as a witness and proceeded to answer a few perfunctory questions. He gave no relevant testimony other than to give his name, rank, and command. He acknowledged that he had signed the waiver in the presence of a notary and understood its import. Upon being given a financial questionnaire, petitioner was dismissed with instructions to return to the grand jury on July 1 with the questionnaire completed. 210 R. 10-11; 290 R. 27.

(2) July 15, 1964. Petitioner, having been duly subpoenaed, appeared on July 15, 1964, before another grand jury—known as the Third July 1964 Grand Jury. This time he was represented and advised by counsel. Upon his appearance before the grand jury, he declined to sign a

limited waiver of immunity as offered by an Assistant District Attorney. 210 R. 13; 290 R. 29. Following this refusal, the petitioner and the Assistant District Attorney engaged in this colloquy (210 R. 13-15; 290 R. 29-31):

Q. Well, now, you appreciate that under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct or to the performance of your official conduct or to the performance of your official duties, you understand that?

A. I realize that, sir, yes.

Q. Even though you still have your constitutional privilege against self-incrimination?

A. Right, sir.

Q. That you can invoke at any time?

A. Right.

Q. But if you invoke that privilege then you are subject to the forfeiture of your position as a public officer?

A. I realize that.

Q. You know that? You appreciate the consequences of your failure to sign this limited waiver of immunity as required by the Constitution of the State of New York and the City Charter?

A. I do, sir.

Q. And you appreciate also that in view of the fact that you signed a waiver of immunity before the First June Grand Jury, which is still in existence, that you may be required to appear before that grand jury and give testimony under such waiver, you understand that?

A. I—Mr. District Attorney, I believe I stated before that I had signed a partial waiver of immunity and, at that time, up until now I didn't have time to confer and discuss my case with any attorney. And at this time I have conferred with an attorney and

upon his advice, he advised me to withdraw my partial waiver of immunity.

Q. You mean your limited waiver of immunity?

A. Partial or limited, yes sir, whichever.

Q. Well, now do I take it then that you have no intention to give testimony before the First June Grand Jury?

A. I—at this time I wish to stand on my constitutional rights.

Q. But I'm asking you, if you should be called before the First June 1964 Grand Jury before which you executed a limited waiver of immunity, is it your intention not to answer questions?

A. I shall so ask to have my partial waiver nullified.

Q. In other words, I take it that it's your intention not to testify?

A. That's correct, sir.

Q. Is that correct? Well, now, as I explained to your lawyers outside, there's a serious question as to whether you can do that, but, nevertheless, that doesn't concern this grand jury at this time, and it doesn't affect your obligation as a public officer to sign a limited waiver of immunity before this particular grand jury, you understand that?

A. Yes, sir.

Q. So that I take it then that you refuse to sign this limited waiver of immunity as required by the constitution and the—the Constitution of the State of New York and the Charter of the City of New York; is that right?

A. I do. I've been advised by my counsel now.

Q. You refuse to do so?

A. I do so, yes.

Mr. Scotti: You're excused.

The following day, July 16, petitioner received a letter dated July 15, 1964, from the Chief Clerk of the Police Department informing him (210 R. 21):

> ". . . that you having appeared before the Third July, 1964 Grand Jury of the County of New York, on the 15th day of July, 1964, and having refused to waive immunity from prosecution, as required by Section 1123 of the New York City Charter, the Police Commissioner has ordered that your employment as a member of the Police Department of the City of New York be terminated, and your office vacated."

(3) July 22, 1964. On this date petitioner was summoned to reappear before the First June 1964 Grand Jury, before whom the petitioner had appeared immediately after execution of the waiver of immunity on June 26. But this time he refused to answer any questions on the basis of his state and federal constitutional rights. See 210 R. 15-16; 290 R. 31-32. In particular, he refused on these grounds to answer the following incriminating question:

> "Now, I am going to ask you point blank, in order to remove any doubt in your mind as to the nature of the questions we wish to put to you and concerning which you executed a waiver of immunity, did you, during the last five years, receive any money from bookmakers or policy operators in order to permit these bookmakers and policy operators to conduct their gambling operations in violation of the Penal Laws of the State of New York; did you?"

Immediately following this refusal to answer, petitioner was taken before Judge Charles A. Marks of the State Supreme Court. The judge directed him to answer the above-quoted question but petitioner declined to do so in reliance upon his federal constitutional privilege against self-incrimination. See 210 R. 18; 290 R. 34. The judge immediately and summarily found petitioner guilty of criminal contempt of court. About a week later, on July 28, Judge Marks heard arguments by counsel as to the

pertinence and applicability of the federal constitutional privilege against self-incrimination in the light of the facts of this case and with reference to petitioner's refusal to answer the one question asked of him.

At the conclusion of this hearing, which was said to be in the nature of a reargument, Judge Marks adhered to his original decision, stating that "[I] find the witness in criminal contempt of this court, and I fine the witness the sum of $250 and thirty days in the Civil Jail of the City of New York." 210 R. 37. It is that conviction which forms the basis of the subsequent appeal in the state courts and which is now before this Court in No. 210.

(4) September 28, 1964. While review of the foregoing contempt conviction was still pending, petitioner was again subpoenaed on September 28, 1964, to reappear for the third time before the same First June 1964 Grand Jury. Once again the question regarding receipt of payment from gamblers was put to him and once again petitioner declined to answer, claiming his federal privilege. He was forthwith brought before Judge Schweitzer of the State Supreme Court. And upon his continued refusal to answer the question, when directed to do so by the judge, petitioner was held in contempt of court. And he again was fined $250 and sentenced to imprisonment for thirty days. See 210 R. 51; 290 R. 1, 11, 45-46, 57.

(5) January 11, 1965. On this date petitioner once more appeared, in response to a new subpoena, before the First June 1964 Grand Jury. At that appearance, petitioner did respond to questions about the prior proceedings but declined again to answer the incriminating question concerning the receipt of money from gamblers; the refusal was explicitly premised on "my rights under the fifth, sixth and fourteenth amendments of the Constitution." See 290 R. 16-17.

During the course of this grand jury hearing, the Assistant District Attorney made it clear in his questions to

petitioner that it had been explained to petitioner at the time of his first appearance on June 26, 1964, that: (1) under the federal Constitution he had a right to refuse to answer any questions that might tend to incriminate him; (2) under the New York State Constitution and the New York City Charter a person who desires to continue in public office is required to sign a limited waiver of immunity; (3) if he failed to sign a limited waiver of immunity he could lose his job; and (4) if he signed such a waiver, what he said would be taken down and could be used against him if an indictment were returned. 290 R. 13-14. The Assistant District Attorney further made it plain that (290 R. 16)

> "... regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity."

Upon his refusal to answer the incriminating question, petitioner was immediately taken before Judge Schweitzer again. There he declined, on federal constitutional grounds, to obey the court's direction to answer the question. 290 R. 21. The judge's immediate response was to adjudge petitioner in contempt, to fine him $250 and to sentence him to thirty days' imprisonment. 290 R. 21-22. It is that judgment which formed the basis of petitioner's petition in the federal District Court for a writ of habeas corpus and which is now before this Court in No. 290.

B. The Legal Proceedings

(1) The appeal from the first contempt conviction. Following the imposition on June 28, 1964, by Judge Marks of the $250 fine and the thirty-day imprisonment sentence, petitioner immediately appealed to the Appellate Division of the Supreme Court, First Judicial Department. An application to stay execution of the sentence pending the appeal was denied, 290 R. 40, but oral argument on the

appeal was advanced to September 9, 1964. The petitioner served his term of imprisonment from August 5 to September 4, 1964, and paid the $250 fine. 290 R. 40.

While serving his jail sentence, petitioner applied to the federal District Court for a writ of habeas corpus. This application was denied by Judge Herlands on August 14, 1964, for "three interrelated reasons." See 290 R. 39-42. These reasons were: (1) the pendency of the appeal before the Appellate Division; (2) the lack of any extraordinary reason for dispensing with the general requirement that state remedies be exhausted before invoking federal habeas corpus; and (3) the presence of "novel and far-ranging constitutional questions posed by the petitioner" that would require extensive research and mature deliberation and that could probably be determined by the New York appellate courts.

Later, on October 30, 1964, the Appellate Division dismissed the appeal, which was in the form of a petition to annul the lower court's mandate and to remit the $250 fine. See 210 R. 40-43; 290 R. 36-38. The court's memorandum decision stated that the contempt adjudication must be sustained on the authority of *Regan* v. *New York*, 349 U.S. 58. The court felt, as a consequence, that the effect of *Malloy* v. *Hogan*, 378 U.S. 1, on the constitutionality of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter need not be reached; that problem would become pertinent, said the court, only if and when petitioner testified and it must be determined whether he has accordingly received immunity or has effectively waived it. 210 R. 43; 290 R. 38. Leave to appeal this decision to the Court of Appeals of New York was denied. 210 R. 55. And this is the matter now before this Court in No. 210.

(2) The federal habeas corpus proceeding. Prior to surrendering for execution of the imprisonment judgment

for the second contempt conviction, petitioner sought to remove the contempt proceedings to the federal District Court pursuant to 28 U.S.C. § 1443. District Judge MacMahon on October 20, 1964, vacated and dismissed the removal petition. As later noted by the Court of Appeals for the Second Circuit, 290 R. 57-58, n. 3, Judge MacMahon indicated "that Stevens could not do by indirection what he could not do directly—test the validity of his waiver of immunity in advance" and further indicated "that neither the provisions of the state constitution nor the city charter providing for waivers of immunity infringed any state or federal constitutional right."

In the meantime, the five-day stay of execution afforded petitioner to appeal the second contempt conviction expired and petitioner was forced to serve his second thirty-day sentence and to pay the $250 fine. No formal appeal was taken from this judgment of conviction. It was while he was serving this second jail term that the Appellate Division dismissed the petition seeking to annul the first contempt adjudication.

After the petitioner completed service of the second sentence and while leave to appeal the Appellate Division's judgment to the New York Court of Appeals was under consideration, petitioner was forced to appear on January 11, 1965, for the fourth time before the First June 1964 Grand Jury—resulting in another contempt conviction, a thirty-day jail sentence, and a $250 fine. While serving this new jail term, petitioner on February 8, 1965, filed the present petition for a writ of habeas corpus in the federal District Court, a petition which challenged the constitutional validity of this last of the contempt convictions. See 290 R. 1-5.

To prevent expiration of petitioner's sentence pending decision on the habeas corpus application, the District Court issued a writ pursuant to which petitioner was

brought into federal custody and, without opposition, released on his own recognizance. 290 R. 44, n. 1. Later, the District Court, after a hearing, dismissed the writ of habeas corpus. 290 R. 44-50. While holding that the circumstances were such as to justify the seeking of federal relief at this juncture, the court concluded that the decision in *Regan* v. *New York*, 349 U.S. 58, was dispositive of petitioner's claims. Unless *Regan* were to be overruled, said the court, resolution of those constitutional contentions "must await an attempt to prosecute him on the basis of the compelled testimony, or an adjudication with respect to his employment rights." 290 R. 50.

The District Court then certified that there was probable cause for an appeal, 290 R. 52, and the Court of Appeals for the Second Circuit quickly ordered that petitioner be continued at large on his own recognizance pending the hearing and determination of an expedited appeal. 290 R. 53. That appeal resulted in the opinion of May 11, 1965, affirming the action of the District Court with respect to the habeas corpus petition. 290 R. 54-63. The Court of Appeals was of the belief, shared by the other courts that had considered petitioner's federal constitutional questions, that the decision in *Regan* v. *New York*, 349 U.S. 58, was controlling, making premature petitioner's constitutional attacks on the validity of Article 1, Section 6, of the New York State Constitution and of Section 1123 of the New York City Charter. That is the decision now under review by this Court in No. 290.

(3) The state court review of petitioner's summary dismissal. Finally, it should be noted that petitioner has initiated, under Article 78 of the New York Civil Practice Law and Rules[2], a proceeding to obtain review of the sum-

[2] See Article 78, § 7801, et seq. [McKinney's Consolidated Laws of New York Annotated, Book 7B, Civil Practice, Law and Rules, § 7801, et seq.].

mary dismissal action of the Police Commissioner, dated July 15, 1964. See 290 R. 3. As noted by the Court of Appeals for the Second Circuit, 290 R. 58, n. 4, that proceeding "seeks restoration of his title and position, with full pay and allowances retroactive to the date of his dismissal" and has elicited an answer from the Corporation Counsel of New York City that includes "an offer to restore petitioner to his position with back pay, provided he testifies pursuant to his limited waiver of immunity now challenged."

That proceeding is still pending in the State courts and is not involved in either of the two cases now before this Court for review.

SUMMARY OF ARGUMENT

The sole issue as to which certiorari was granted involves the validity, under the United States Constitution, of those provisions of the New York State Constitution (Article 1, Section 6) and of the New York City Charter (Section 1123) which threaten summary forfeiture of employment as to any public employee who seeks to invoke his Fourteenth Amendment privilege against self-incrimination.

This issue is necessarily and properly before this Court despite the fact that the lower courts thought the issue need not be resolved. The lower courts sought to avoid the issue, which had been properly raised before them, by reference to this Court's decision in 1955 in *Regan* v. *New York*, 349 U.S. 58. The Court there held that the existence of the New York immunity statute removed any possible justification which the petitioner Regan might have had for not testifying in a state grand jury investigation. If, as Regan claimed, the waiver of immunity which he had signed was coerced—and a belated reference was made in that connection to the coercive impact of the provisions of the State Constitution and City Charter here in issue—the statutory immunity was said by this Court to protect

him from prosecution. Hence he could not justify a present refusal to testify, whatever the merits of the claimed coercion.

But there are several vital distinctions between the instant proceedings and those in *Regan*. Most importantly, the entire constitutional climate has changed. The *Regan* case was decided more than nine years prior to *Malloy* v. *Hogan*, 378 U.S. 1, which for the first time established that the Fourteenth Amendment protects the privilege against self-incrimination against state encroachment. Thus the *Regan* case could not and did not involve any assertion of or penalty on a *federally-protected privilege*, whereas the petitioner here expressly claimed such a privilege in the state grand jury proceedings. The assessment of petitioner's claims, unlike those of Regan, must accordingly be viewed with respect to the sanctity of a privilege protected by the United States Constitution. Both substantively and procedurally, federal principles now prevail that were not involved in *Regan*.

Moreover, there are significant factual differences that serve to distinguish the *Regan* decision. The petitioner here was entrapped by the Assistant District Attorney into the belief that, following his signing of a limited waiver of immunity without the advice of counsel, but two choices were before him: (1) he could claim at any time his federal privilege against self-incrimination, in which event he would suffer the employment forfeitures decreed by the State Constitution and the City Charter, or (2) he could waive his immunity and subject himself to possible prosecution based on incriminating answers. Not once was he advised of any possible applicability of the New York immunity statute should he give incriminating answers. Indeed, the Assistant District Attorney made plain the State's position that petitioner had no immunity whatever.

Such a combination of facts constitutes an unconstitutional entrapment as defined in *Raley* v. *Ohio*, 360 U.S. 423,

and serves to distinguish the *Regan* decision. The essential prop of *Regan* was the existence and applicability of the state immunity statute, which was here impliedly read out of existence so far as these grand jury proceedings were concerned.

Thus it is fair and indeed necessary to consider the merits of the constitutional question as to the validity of the provisions of the State Constitution and City Charter. As to that question, the decision in *Malloy* v. *Hogan*, 378 U.S. 1, 8, demonstrates the constitutional invalidity of the effort made by these provisions to penalize those public employees seeking to invoke their federally-protected privilege not to incriminate themselves. The *Malloy* decision made plain that (1) an individual may waive the privilege and choose to speak "in the unfettered exercise of his own will" and (2) if he chooses to remain silent he shall "suffer no penalty . . . for such silence." The provisions in question violate both those principles.

The State Constitution and the City Charter compel the employee—by force of the threat of job forfeiture—to waive his federal privilege against self-incrimination. Failure to waive immunity and insistence upon invoking the privilege mean automatic and summary dismissal and future disqualification for employment. Such a choice and such a penalty negate the principles expressed in the *Malloy* case. The employee has no unfettered will under these circumstances in determining whether to waive his federal privilege; that is true even as to the employee like petitioner who bends to the pressure and signs a waiver of immunity.

It is no answer that the petitioner may lack any constitutional right to be a policeman. As a public servant, and like any other citizen, he is free to assert the constitutional privilege against self-incrimination without fear or threat of employment forfeiture should he insist upon invoking that privilege.

Whether and to what extent a public servant may be dismissed or disciplined for failing to disclose pertinent information concerning his public duties is not here in issue. The sole questions are whether he can be punished by summary contempt procedure for the very act of exercising a privilege protected by the Fourteenth Amendment and whether a state law that imposes coercion and penalties with respect to that act can withstand constitutional scrutiny. Those questions must be answered in the negative.

ARGUMENT

I. THE ISSUE AS TO THE VALIDITY, UNDER THE FEDERAL CONSTITUTION, OF ARTICLE I, SECTION 6, OF THE NEW YORK STATE CONSTITUTION AND SECTION 1123 OF THE NEW YORK CITY CHARTER IS NECESSARILY AND PROPERLY BEFORE THIS COURT FOR DECISION

At all stages of the two proceedings now before this Court petitioner expressly brought into question the federal constitutional validity of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter.[3] In petitioner's view, these pro-

[3] In No. 210, the state court proceeding, the review petition filed in the Appellate Division made reference (210 R. 5-6) to the argument advanced before Judge Marks (210 R. 30) that the designated provisions of the State constitution and city charter were in violation of the United States Constitution. The memorandum decision of the Appellate Division took note of that contention but thought it need not be resolved (210 R. 43).

In No. 290, the federal habeas corpus proceeding, the habeas corpus petition alleged (290 R. 4) that the District Attorney was "using and abusing" these provisions to deprive him of his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments; the petition further incorporated by reference (290 R. 5, 38, 42) the "novel and far-ranging constitutional issues posed by the petitioner" in the state court proceedings, including the contention that *Malloy* v. *Hogan*, 378 U.S. 1, rendered unconstitutional the provisions in question (290 R. 38). But the federal courts also thought it unnecessary to resolve that contention (290 R. 61-62).

visions constituted an unreasonable and unconstitutional penalty for asserting his privilege under the Fifth and Fourteenth Amendments not to incriminate himself. As the Assistant District Attorney repeatedly stated (290 R. 7-8, 13-14), petitioner had a federal constitutional privilege not to answer any incriminating question but if he invoked that privilege the state laws in question would operate to forfeit his position as a public officer and to bar him from future employment by the City or State. In these circumstances, petitioner argued, the constitutional validity of imposing such a penalty upon the assertion of a federal constitutional privilege was properly put in issue by a contempt conviction stemming from an attempt to assert that privilege.

But both the state and the federal courts below thought that this contention was premature and need not be resolved. The decision of this Court in 1955 in *Regan* v. *New York*, 349 U.S. 58, was said to foreclose at this juncture any attempt to question the constitutional validity of this penalty for asserting the privilege. As the lower courts read the *Regan* decision, petitioner was required to answer the incriminating question pursuant to the waiver of immunity and to await a prosecution for an offense based upon an incriminating answer; only then could he test the validity of the waiver or the validity of the penalties contained in Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter.

There are, of course, numerous factual parallels between the *Regan* case and the instant ones. Regan, like the petitioner, was a New York City policeman who, prior to being called before a grand jury, signed a waiver of immunity against prosecution.[4] And, on a subsequent

[4] Some weeks after he signed the waiver, Regan's "connection with the police department was severed." 349 U.S. at 61. But that severance was voluntary on Regan's part (R. 122-123, No. 54, 1954 Term), unlike the involuntary dismissal of the petitioner herein.

appearance before the grand jury, he declined to answer a question on the ground that his answer might tend to incriminate him. Upon persisting in his refusal to answer following a court command Regan was indicted for criminal contempt, tried by a jury and convicted.

This Court premised its *Regan* decision on the critical fact that the New York immunity statute[5] "removed any possible justification which petitioner [Regan] had for not testifying." 349 U.S. at 62. If, as Regan claimed, the waiver of immunity had been illegally coerced, the statutory immunity from prosecution persisted and his refusal to give incriminating testimony was unjustified; on the other hand, if the waiver were valid and voluntary Regan had no cause to object to giving incriminating testimony. Hence, said this Court, the alleged invalidity of the waiver could only be made a defense to a subsequent prosecution based on the incriminating answers, a defense which was irrelevant to the contempt prosecution for refusing to testify at all. 349 U.S. at 64.

A. The constitutional distinctions from the Regan case

But the factual, legal and constitutional distinctions between the instant proceedings and those in the *Regan* case are so marked and so consequential as to make the *Regan* ruling inapplicable here. Most significantly, the entire constitutional atmosphere surrounding the *Regan* case has dramatically changed. At the time of that decision in 1955, it was well established that the Fourteenth Amendment did not secure against state invasion the privilege against self-incrimination as guaranteed against

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[5] See § 381(2) and § 2447(1) of the New York Penal Law, quoted in footnote 6 of the opinion of the Court of Appeals for the Second Circuit in No. 290 (290 R. 61). Those sections provide means of granting immunity with respect to incriminating testimony before grand juries investigating alleged bribery of public officials.

federal infringement by the Fifth Amendment. *Twining* v. *New Jersey*, 211 U.S. 78; *Adamson* v. *California*, 332 U.S. 46; and see the later decisions in *Knapp* v. *Schweitzer*, 357 U.S. 371; *Cohen* v. *Hurley*, 366 U.S. 117. Thus Regan did not and could not claim that his refusal to testify was in any way grounded upon a privilege against self-incrimination as protected by the United States Constitution. Whatever coercion or invalidity that Regan claimed had infected his waiver could in no way create a penalty or burden upon the assertion of a federally-protected privilege.

It was not until more than nine years after the *Regan* decision—indeed, just 11 days prior to this petitioner's first appearance before the grand jury—that this Court announced a new and major development in constitutional law: the holding that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy* v. *Hogan*, 378 U.S. 1, 6; see also *Murphy* v. *Waterfront Commission*, 378 U.S. 52, and the later decision in *Griffin* v. *California*, 380 U.S. 609. Thus this petitioner, unlike Regan, was able to and did assert a federally protected privilege against self-incrimination in refusing to answer the incriminating question. And the federal nature of that privilege was fully and consistently recognized by the Assistant District Attorney, such as when he asked the petitioner in the presence of the grand jury whether he understood "that under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you." 210 R. 9; 290 R. 26.

The significance of this development in constitutional doctrine is not to be minimized in terms of the propriety of questioning, in a criminal contempt prosecution for refusing to answer an incriminating question, a penalty imposed on the assertion of the privilege against self-incrimination. Prior to the decision in *Malloy* v. *Hogan*,

a defendant could urge only that the proceeding in which he declined to testify, or in which he was convicted of contempt for such refusal, was in some manner so procedurally unfair as to amount to a denial of federal due process. See *Raley* v. *Ohio*, 360 U.S. 423. He could not assert any privilege under the Fourteenth Amendment not to testify at all. Nor could he claim that any penalties or conditions had been imposed on the invocation of a federal privilege. And the *Regan* decision proves only that it is not *procedurally* unfair, in the Fourteenth Amendment sense, to exclude from consideration in a contempt prosecution any claim of illegality as to a waiver of immunity.

But with the advent of the *Malloy* doctrine the issues have changed and the entire scene has broadened. The States are now on notice not only that they must provide procedural fairness but that, when confronted with a refusal to incriminate oneself, they are dealing with the very substance of a federally-protected privilege. When an individual invokes that federal privilege in a state proceeding, whatever its nature, state authorities must now accord that privilege the full protection and respect given by the Fifth Amendment to the assertion of the privilege in federal proceedings. Thus the principles that have been announced by this Court respecting the constitutional impermissibility of penalizing an individual for asserting the self-incrimination privilege, see, e.g., *Orloff* v. *Willoughy*, 345 U.S. 83, 91, have become fully relevant to penalties imposed by States upon those invoking the federally-protected privilege in state proceedings.[6]

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[6] Cf. *United States ex rel. Carthan* v. *Sheriff, City of New York*, 330 F. 2d 100 (C.A. 2), cert. denied, 379 U.S. 929, expressing some doubt about the validity of Section 1123's restriction on the privilege against self-incrimination. The Second Circuit there found that the defendant had voluntarily waived the privilege by disclosing his financial affairs and thus the court felt it unnecessary to rest its decision on the *Regan* decision.

More particularly, when Regan made his belated claim before this Court[7] that he had been coerced into signing a waiver of immunity by virtue of the New York laws that operated to forfeit his public employment should he fail to sign, such a penalty upon the privilege to remain silent was not a penalty that attached to the assertion of a privilege recognized to be protected by the Fourteenth Amendment.[8] Not until the change wrought by *Malloy* v. *Hogan* was it possible to view and assess such a penalty in terms of its impact upon a federally-protected privilege. Then and then only could the New York penalties as such be said to be imbued with Fourteenth Amendment considerations. Whereas prior to *Malloy* they might by operation indirectly result in some procedural unfairness condemned by the Fourteenth Amendment, these penalties after *Malloy* must also be tested in terms of their direct encroachment upon the Fourteenth Amendment privilege to remain silent. Thereby is evident the fundamental in-

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[7] In the *Regan* opinion, 349 U.S. at 63, n. 9, this Court pointed out that Regan's contention that the provisions of the New York Constitution and the City Charter—which were essentially identical to those to which petitioner herein objects—required him to sign the waiver of immunity or lose his job had not been raised at any point in the proceedings below. The contention appeared for the first time in the Petition for Certiorari. Thus, under the rules of this Court, the contention came too late for consideration. See *Adler* v. *Board of Education*, 342 U.S. 485, 496.

[8] In *Canteline* v. *McClellan*, 282 N.Y. 166, 170, 25 N.E. 2d 972, 973, decided in 1940, the New York Court of Appeals viewed the immunity from prosecution as contained in Article 1, Section 6, of the State Constitution as entirely unrelated to any requirement in the United States Constitution and thus "could have been omitted in its entirety from the present Constitution of our State." The decision in *Twining* v. *New Jersey*, 211 U.S. 78, was cited in support of the quoted remark.

applicability of the *Regan* decision and rationale to the contention now before this Court.[9]

Additionally, of course, since federal standards now govern the assertion of this federal privilege in state proceedings, federal principles also mark the limitations, exclusions, waivers, conditions and penalties that may be attached to such an assertion. See *Malloy* v. *Hogan, supra,* 7-8; *Murphy* v. *Waterfront Commission, supra,* 79. Included among the matters thus subject to federal considerations must be the time and the place for raising and resolving claims of unreasonableness and unconstitutionality with respect to state penalties imposed on the invocation of the federal privilege against self-incrimination.

It would follow, under federal standards not applicable at the time of the *Regan* decision to assertions of the privilege in state proceedings, that the propriety of such an assertion may and indeed should be adjudicated when the defendant is prosecuted for contempt for failure to answer a question in reliance on the privilege. From the earliest days, federal contempt proceedings have been the vehicles for determining the nature and scope of the privilege under the Fifth Amendment, the circumstances under which that privilege has been voluntarily waived, and the impact of federal immunity statutes upon assertions of the privilege. See, e.g., *Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591; *Ullmann* v. *United States,* 350 U.S. 422. In none of those situations has this Court imposed any *Regan*-type requirement that the defendant await a prosecution based upon an in-

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[9] While not of critical significance, it should also be noted that Regan was convicted of contempt for refusing to answer an incriminating question only after an indictment and a jury trial wherein he was allowed to develop fully his reasons for refusing to answer. See *Regan* v. *New York,* 349 U.S. at 61. The petitioner herein, however, was convicted summarily by the various state court judges. Compare *Harris* v. *United States,* 382 U.S. —— (No. 6, Oct. Term, 1965, decided Dec. 6, 1965).

criminating answer before alleging that his privilege was not truly waived or that a given statute does not confer adequate immunity. And when the issues as to the nature and propriety of the assertion of the privilege came before the Court in the context of a state contempt proceeding in *Malloy* v. *Hogan, supra,* no question was raised as to the propriety of utilizing the contempt case as the basis for resolving the issues involved.

Thus, when a defendant has asserted his federal privilege against self-incrimination in the course of state proceedings, the propriety of that assertion and the propriety of any effort to force him to abandon the privilege should be determined upon a contempt prosecution for failure to reply to an incriminating question. That is the forum, that is the time, for considering and resolving the competing interests of the state and the individual. And if the individual's reliance on his federal privilege against self-incrimination be found justified, he avoids the unfair loss of liberty or other penalty attendant upon an unwarranted contempt conviction.

B. The factual distinctions from the Regan case

Moreover, apart from and in addition to the aforementioned federal standards made relevant by the *Malloy* decision, the particular circumstances of this case demand that petitioner be allowed at this juncture to contest the penalties imposed by the State and City on his invocation of the federal privilege. The critical basis of the *Regan* decision was the existence and availability of the New York immunity statute, which was held to remove any possible justification Regan might have had for not testifying. 349 U.S. at 62. But while that immunity statute is still in existence, and more particularly was extant at the time of petitioner's refusals to answer the incriminating question, the entire proceedings below proceeded on a basis that was totally inconsistent with any belief or possibility that the immunity statute would protect

petitioner should he give incriminating answers and should he be correct in his assertion that the State and City had unconstitutionally penalized his invocation of the federal privilege.

Repeatedly and in the presence of the grand jury, the Assistant District Attorney made it plain to petitioner, *who had already signed the limited waiver of immunity before he had had an opportunity to consult counsel,*[10] that as a potential defendant he still had a choice between (1) refusing to answer any question that might tend to incriminate him, in reliance upon the Constitution of the United States, and (2) answering questions concerning the conduct of his office, pursuant to the signed waiver of immunity, and thereby subjecting himself to possible indictment and prosecution on the basis of those answers. 210 R. 9-10, 13-15; 290 R. 25-26, 29-31. Always coupled with the statements of this choice were reminders by the Assistant D strict Attorney that any refusal to sign the waiver or any invocation of the privilege against self-incrimination would result in a forfeiture of petitioner's position as a public officer by virtue of the provisions of Article 1, Section 6, of the New York State Constitution and Section 1123 of the New York City Charter. Thus at his initial appearance before the grand jury, without having had the benefit of counsel, petitioner was asked by the Assistant District Attorney if he understood that

> (1) ". . . under the Constitution of the United States you have a right to refuse to answer any questions that might tend to incriminate you . . .", and
>
> (2) ". . . under the New York State Constitution, and New York City Charter, a public officer is required, if he desires to continue to hold his public position, to

[10] The waiver of immunity was limited in the sense that it related only to matters involving petitioner's official duties and conduct in public office; there was no waiver of immunity as to strictly private matters.

> sign a limited waiver of immunity . . . that means . . . that what you say will be taken down and recorded, and that should this grand jury vote a true bill against you, that is an indictment—to indict you for a crime, the testimony you give can and will be used against you." [210 R. 9-10; 290 R. 25-26.]

This choice was reiterated at petitioner's second appearance, the Assistant District Attorney stating in reverse order that:

> (1) ". . . under the Constitution of the State of New York and the City Charter as a public officer, if you choose to retain your public office, you are required to waive immunity with respect to matters that relate to your official conduct,"
>
> (2) "Even though you still have your constitutional privilege against self-incrimination . . . [t]hat you can invoke at any time . . . But if you invoke that privilege you are subject to the forfeiture of your position as a public officer." [210 R. 13; 290 R. 29.]

And the so-called choice was again repeated to petitioner by the Assistant District Attorney at his last appearance before the grand jury. See 290 R. 13-14.

But not once was petitioner told that if he responded with incriminating answers the state immunity statute could, would or might preclude a prosecution based on such answers. On the contrary, the Assistant District Attorney made it clear (290 R. 14) that

> ". . . if you signed a limited waiver of immunity, which required you to answer questions concerning your conduct in public office, that what you said would be taken down and recorded and that should this grand jury vote a true bill against you, that is an indictment, the testimony you give could be and will be used against you . . ."

Indeed, the State expressly disavowed any possibility that immunity could attach to petitioner's incriminating answers

when the Assistant District Attorney told petitioner (290 R. 16) that

> ". . . regardless of what your lawyer may say or what anyone else may say, that it is the contention of the People that this is a valid waiver of immunity and that you do not have immunity . . ."

In such circumstances, the ruling of this Court in *Raley* v. *Ohio,* 360 U.S. 423, 437-439, becomes highly relevant. There the Court held violative of the Due Process Clause of the Fourteenth Amendment state contempt convictions wherein the defendants had been entrapped by being convicted for exercising a privilege which the state investigating commission had led them to believe was available to them. The commission chairman had affirmatively apprised them that they had a privilege against self-incrimination that they were entitled to exercise and never even suggested the existence or applicability of the Ohio immunity statute; and other members of the commission and its counsel made statements that were totally inconsistent with any belief in the applicability of the state immunity statute. In fact, said this Court (360 U.S. at 438), "it is fair to characterize the whole conduct of the inquiry as to the four as identical with what it would have been if Ohio had had no immunity statute at all."

In *Raley,* as here, the defendants were convicted of contempt because of their refusal to answer relevant questions on the ground of possible self-incrimination. The refusal to answer, based upon the privilege, was said to constitute the offense. And the Ohio Supreme Court had affirmed the *Raley* convictions on the express ground that the state immunity statute was necessarily available and precluded the possibility of justifying a refusal to answer on grounds of self-incrimination. But this Court in *Raley* did not adopt such a *Regan*-type analysis and hold that the availability of the Ohio immunity statute automatically removed any basis for refusing to answer relevant questions.

Instead, the Court pointed to the action of the commission officials as creating "the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him . . . Here there were more than commands simply vague or even contradictory. There was active misleading . . . We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances." 360 U.S. at 438-439.

Likewise, in the instant proceedings petitioner was entrapped into believing that he could at any time, despite his having signed the waiver of immunity, invoke his federal privilege against self-incrimination—as a result of which he stands convicted of three contempts. And he was further entrapped into believing that to maintain his public office he had to sign a waiver of immunity and answer incriminating questions—in which event he would have no immunity from possible prosecution. No slightest suggestion was made that the New York immunity statute existed or might be applicable; the Assistant District Attorney made plain the State's position that petitioner had no possible immunity. It is thus fair, as in *Raley*, to characterize the whole conduct of the grand jury procedure as the one it would have been if New York had had no immunity statute at all.

Thus for practical purposes the essential prop of the *Regan* ruling—the potential availability of the New York immunity statute—is missing here. Petitioner was led to believe that he could invoke his federal privilege against self-incrimination only at the pain of losing his public employment and that he would have no immunity should he sign a waiver and answer incriminating questions. As far as the unannounced possibility of the state immunity statute being applicable was concerned, petitioner was left to the real risk that the state courts would subsequently rule that the immunity statute does not apply in these

circumstances—as the State in effect advised him—and that he could be prosecuted on the basis of any incriminating testimony he might now be compelled to give. Cf. *United States* v. *Welden*, 377 U.S. 95. Petitioner's fear that state authorities might use the answers against him in a subsequent state prosecution was both understandable and reasonable. See *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 79-80.

Application of the principles enunciated in *Raley* v. *Ohio*, *supra*, which was decided subsequently to and without citation of the *Regan* decision,[11] would invalidate petitioner's contempt convictions under the Due Process Clause of the Fourteenth Amendment. But since that is not the issue formally presented to this Court it is enough to say that the proceedings here were not only in the nature of an unconstitutional entrapment as defined in the *Raley* case but were such as to put squarely in issue the constitutional validity of the New York penalties for the invocation of the federal privilege against self-incrimination. Having been told by the Assistant District Attorney that he could at any time invoke that privilege on pain of forfeiting his public office and having been convicted of contempt for claiming that privilege, the validity of such threatened forfeiture is inescapably presented. And the fact that petitioner was immediately and summarily discharged upon refusing to sign a second waiver of immunity only demonstrates the reality and substantiality of the penalties imposed by New York law.

Thus the combination of the historic constitutional change embodied in *Malloy* v. *Hogan* and the totality of the circumstances surrounding the petitioner's invocation of the federal privilege against self-incrimination combine to differentiate the governing principles and the facts in-

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[11] In fact, the *Regan* decision has never been cited or utilized by this Court subsequent to its rendition in 1955.

volved in *Regan* v. *New York, supra*.[12] The question presented for decision herein, the question as to which certiorari was limited by this Court, is necessarily and properly at issue by virtue of the judgments below.

2. THE FOURTEENTH AMENDMENT PROHIBITS ANY PENALTY FOR INVOKING THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THUS OUTLAWS THE SUMMARY PUBLIC EMPLOYMENT FORFEITURE DECREED BY ARTICLE 1, SECTION 6, OF THE NEW YORK STATE CONSTITUTION AND SECTION 1123 OF THE NEW YORK CITY CHARTER

At the heart of this case is the constitutional principle recognized in *Malloy* v. *Hogan*, 378 U.S. 1, 8, that "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence." The Fourteenth Amendment, in other words, bars any criminal or other penalty directed solely at the act of claiming the privilege and refusing to answer questions in a state proceeding where the answers are reasonably thought to be incriminatory.

Here this petitioner sought to invoke that Fourteenth Amendment privilege, a privilege which the Assistant District Attorney persistently acknowledged was his to invoke. And because of that invocation petitioner has thrice been convicted of contempt of court, following judicial commands

[12] The suggestion of Judge Weinfeld in the federal court proceeding below (290 F. 50, n. 20) that the relevance of the *Malloy* case "is less clear, since the *Regan* court seems to have proceeded on the assumption that the self-incrimination clause did apply" is impermissible. Mr. Justice Reed, the author of the *Regan* opinion, wrote the opinion for the Court in *Adamson* v. *California*, 332 U.S. 46, 50-51, which expressly reaffirmed the pre-*Malloy* rule that the Fifth Amendment's protection of the privilege against self-incrimination "is not made effective by the Fourteenth Amendment as a protection against state action." It is not to be supposed that Mr. Justice Reed abandoned the *Adamson* principle in writing the *Regan* opinion. The *Regan* opinion, 349 U.S. at 59, cites the *Adamson* case preceded by a "Cf."

to answer an incriminating question. The constitutional invalidity of such convictions is made obvious by the *Malloy* case and the host of federal cases that preceded it with respect to the Fifth Amendment. See, e.g., *Hoffman* v. *United States*, 341 U.S. 479; *Blau* v. *United States*, 340 U.S. 159.

The constitutional vice inherent in petitioner's convictions is no less obvious by reason of the fact that he signed a limited waiver of immunity, required by state law as a condition of maintaining his position as a policeman. As the *Malloy* opinion noted, 378 U.S. at 8, the great constitutional privilege to remain silent in the face of incriminating questions involves two basic corollaries: (1) that the individual may waive the privilege and choose to speak "in the unfettered exercise of his own will," and (2) that if he chooses to remain silent he shall "suffer no penalty . . . for such silence." And because the limited waiver of immunity signed by petitioner, at a time when he had no opportunity to consult counsel, was the natural and intended consequence of a state scheme to violate those two corollaries, the waiver constitutes no basis for punishing the petitioner for refusing to answer an incriminating question.

In essence, the New York State Constitution (Article 1, Section 6) and the New York City Charter (Section 1123) provide that a public officer like petitioner must, as a condition of maintaining his public position, sign a limited waiver of immunity when called upon to testify concerning the conduct of his office or the performance of his official duties. Refusal to sign such a waiver results in his automatic removal from office[13] and in disqualification

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[13] In *Slochower* v. *Board of Education*, 350 U.S. 551, 554, it was noted that the New York Court of Appeals authoritatively interpreted § 903 of the New York City Charter—the virtually identical predecessor of the present § 1123—to mean that "the assertion of the privilege against self incrimination is equivalent to resignation." *Daniman* v. *Board of Education*, 306 N.Y. 532, 538, 119 N.E. 2d 373, 377; appeal dismissed for want of a properly presented federal question, 348 U.S. 933.

from holding any other public office or employment with the State for a period of five years and with the City forever.

While cast in terms of requiring the signing of a waiver of immunity, these provisions are plainly designed to fasten their penalties on those who fail to waive their privilege against self-incrimination. A waiver of immunity is nothing more than one method of waiving the privilege. See *Daniman* v. *Board of Education,* 306 N.Y. 532, 538, 119 N.E. 2d 373, 377, where the New York Court of Appeals spoke of these penalties as applicable to those public officers asserting "the privilege against self incrimination." And now that the privilege that petitioner invoked and that led to his dismissal and contempt convictions has acquired the protection of the Fourteenth Amendment, the provisions in question must be viewed as exacting their penalties on those public officers who seek to assert their Fourteenth Amendment privilege against self-incrimination.

Moreover, these New York constitutional and charter provisions must be viewed in terms of their impact both on those who sign and those who do not sign limited waivers of immunity. Those public officers who decline to sign waivers and simply assert their federally-protected privilege are obviously subject to the described penalties. But those who do sign waivers and then assert their federally-protected privilege are no less affected by the compulsive thrust of the summary penalties. An individual who signs a waiver of immunity under the threat of summary employment forfeiture as expressed in these constitutional and charter provisions can hardly be said to have chosen to answer incriminating questions "in the unfettered exercise of his own will." *Malloy* v. *Hogan, supra,* 8. Especially is that true as to this petitioner, who was constantly reminded by the Assistant District Attorney that any failure to sign the waiver or any assertion of his

federal privilege would immediately call into play the penalty provisions in question.

In short, the coercive pressure of these penalties is nonetheless constitutionally significant when the pressure achieves its intended result. "Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary . . ." *Union Pacific R. Co.* v. *Public Service Commission,* 248 U.S. 67, 70.[14]

From any standpoint, therefore, the practical and intended consequences of the New York constitutional and charter provisions are to penalize and inhibit all those public officers seeking to invoke their Fourteenth Amendment privilege against self-incrimination. They must either forfeit their privilege or their employment. And the summary forfeiture of employment is certainly punishment in one of its severest forms. *United States* v. *Lovett,* 328 U.S. 303, 316.[15] Such a coercive choice cannot be sanctioned under the Fourteenth Amendment.

This Court in *Slochower* v. *Board of Education,* 350 U.S. 551, held that the summary dismissal of a public officer pursuant to what is now Section 1123 of the New York

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[14] Mr. Justice Holmes, speaking for the Court in the *Union Pacific* case, further added, 248 U.S. at 70: "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

[15] The *Lovett* opinion, 328 U.S. at 316, stated that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is the type of punishment which Congress has only invoked for special types of odious and dangerous crimes . . ."

City Charter[16]—one of the two provisions here in issue—violated the Due Process Clause of the Fourteenth Amendment. The employee had there invoked his Fifth Amendment privilege against self-incrimination in an appearance before an investigating committee of the United States Senate, an invocation which caused his immediate dismissal under the City Charter provision. In voiding that dismissal, this Court noted that the City Charter provision "operates to discharge every city employee who invokes the Fifth Amendment" and that its heavy hand "falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." 350 U.S. at 558.

And when the heavy hand of that provision falls on a city employee who seeks to invoke his Fourteenth Amendment privilege, compelling him either to forfeit his job or forsake the privilege, the *Slochower* ruling points to the constitutional invalidity of any contempt conviction resulting from reliance on that privilege. If it is constitutionally invalid, as *Slochower* holds, automatically to discharge an employee for asserting a constitutional privilege, it is no less invalid to punish him through summary contempt proceedings for asserting that privilege.

What we have here, stated somewhat differently, is a classic instance of an attempt by a State and a City to impose an unconstitutional condition or penalty upon the privilege of public employment. But as this Court held in *Frost* v. *Railroad Commission,* 271 U.S. 583, 594, one of the limitations on the power of a state to grant or deny a privilege

> ". . . is that it may not impose conditions which require the relinquishment of constitutional rights. If

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[16] At the time of the *Slochower* decision this provision was known as § 903 of the Charter. Section 1123 is simply a recodification of § 903, with no material change.

> the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Precisely because these provisions of the City Charter and State Constitution do impose, as a condition of public employment, the relinquishment of a federal constitutional privilege they must fall under the ban of the United States Constitution, particularly where that relinquishment has resulted in criminal contempt convictions. No government, federal, state or local, can establish as a condition of employment the relinquishment of the federal constitutional privilege against self-incrimination. See *Steinberg* v. *United States,* 141 Ct. Cl. 1, 163 F. Supp. 590, cited with approval in *Sherbert* v. *Verner,* 374 U.S. 398, 404, n. 6.[17] To establish such a condition is to encumber the constitutional privilege with penalties and inhibitions. This no government may do. *Malloy* v. *Hogan,* 378 U.S. 1, 8; *Griffin* v. *California,* 380 U.S. 609, 614; *Orloff* v. *Willoughby,* 345 U.S. 83, 91.[18]

Nor is the validity of these provisions saved by the fact that this petitioner, without benefit of counsel, bent under

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[17] In the *Steinberg* case the Court of Claims held invalid a federal statute providing that federal annuities shall not be paid to federal employees who have asserted the privilege against self-incrimination in any investigation with respect to their federal service. Such a statute was said to constitute an indiscriminate classification of the innocent with the guilty and must fall as an assertion of arbitrary power.

[18] See also *Opinion of the Justices,* 332 Mass. 763, 765, 126 N.E. 2d 100, 102-103; *In re Holland,* 377 Ill. 346, 356-357, 36 N.E. 2d 543, 548; *Matter of Grae,* 282 N.Y. 428, 26 N.E. 2d 963.

See, in general, Note, *Mandatory Dismissal of Public Personnel and the Privilege against Self Incrimination,* 101 U. of Pa. L. Rev. 1190 (1953); Ratner, *Consequences of Exercising the Privilege against Self-Incrimination,* 24 U. of Chi. L. Rev. 472, 495 (1957).

the pressure and signed a limited waiver of immunity. The very choice imposed upon him by the City Charter and the State Constitution—the choice between (1) asserting the privilege and thereby forfeiting his employment and (2) signing a waiver and thereby subjecting himself to possible prosecution—was one that no state can properly impose if due respect is to be paid to the principles underlying the privilege against self-incrimination. Compare the state-imposed choice held invalid in *Baggett* v. *Bullitt*, 377 U.S. 360, 374. If any waiver of the privilege is to be validated, it must occur as the result of the individual's free and unfettered will rather than as the result of a threat of summary loss of employment. And it is that threat, whether or not it is executed, that unduly invades the aura of free will that must necessarily surround any decision to assert or waive the constitutional privilege. The state, in other words, has no constitutional power to put petitioner to "a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden." *Frost* v. *Railroad Commission*, 271 U.S. 583, 593.

Finally, it must be emphasized that the only constitutional principle at stake here concerns the direct assault made upon the assertion of the Fourteenth Amendment privilege by the City Charter and the State Constitution. These appeals from the two contempt convictions do not in any way involve or challenge any power New York may have to discipline or discharge petitioner or any other public employee for refusing to disclose information about the performance of his public duties. See *Slochower* v. *Board of Education, supra*, 559. We are dealing here solely with an effort to penalize and to inhibit a basic constitutional privilege. The validity of that effort is quite unrelated to any power to take some other form of state action in light of the assertion of the privilege. And whether and to what extent the decision in *Malloy* v. *Hogan* may alter the considerations relevant to assessing the power to take some other disciplinary action are matters that must be

left to another day. Cf. *Beilan* v. *Board of Education*, 357 U.S. 399; *Lerner* v. *Casey*, 357 U.S. 468. The sole consideration here relates to punishment by contempt for exercising a federally-protected privilege.

It is irrelevant, therefore, to ponder the Holmesian dictum that the petitioner "has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220, 29 N.E. 517. This Court need not pause here, any more than it did in *Wieman* v. *Updegraff*, 344 U.S. 183, 192, "to consider whether an abstract right to public employment exists." It is sufficient to say, as in *Wieman*, "that constitutional protection does extend to the public servant whose exclusion [from employment] pursuant to a statute is patently arbitrary or discriminatory." See also *Torcaso* v. *Watkins*, 367 U.S. 488, 495-496; *Baggett* v. *Bullitt*, 377 U.S. 360; *Shelton* v. *Tucker*, 364 U.S. 479; *Cramp* v. *Board of Public Instruction*, 368 U.S. 278. It need only be added that the public servant, like any citizen, is free to assert a constitutional right or privilege free of any coercive threat of employment forfeiture or other penalty should he fail to waive that right or privilege.

And among the constitutional protections extending to public servants—including policemen—is the Fourteenth Amendment privilege against self-incrimination. Like every other citizen, the public servant is entitled to assert that privilege freely and without fear of automatic penalty for so doing. And when the public servant is summarily excluded from office because he asserted that privilege, or when on pain of summarily losing his employment he is forced to waive the privilege, the Fourteenth Amendment steps in to outlaw the causative state action. That action in this instance is to be found in Section 1123 of the New York City Charter and in Article 1, Section 6, of the New York State Constitution. And the result of that unconstitutional action is to be found in the contempt convictions of the petitioner, convictions premised upon petitioner's attempt freely to assert his federal constitutional privilege.

CONCLUSION

For these various reasons, the judgments below in No. 210 and No. 290 should be reversed.

Respectfully submitted,

JOHN P. SCHOFIELD
231 West 96th Street
New York, N. Y. 10025

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioner

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